

Alaska Telephone Association

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January 19, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

ORIGINAL

RE: *Ex Parte* Notice

In the Matter of

Federal State Board on Universal Service, CC Docket No. 03-15

Dear Ms. Dortch

Consistent with commission rules, this communication is submitted to be filed in the above referenced docket. On this date, on behalf of the Alaska Telephone Association, copies of the attached white paper prepared by Dorsey & Whitney, LLP discussing conditions that may be imposed on CMRS carriers as part of the ETC designation process was distributed by USPS to members and staff of the Federal-State Joint Board on Universal Service and the FCC as follows:

Hon. Kathleen Q. Abernathy
Hon. Jonathan S. Adelstein
Hon. Michael J. Copps
Hon. Thomas Dunleavy
Hon. Billy Jack Gregg
Hon. Lila A. Jaber
Hon. Kevin J. Martin
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Eric Einhorn
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Christopher Libertelli

Respectfully submitted,



James Rowe

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List A B C D E

Attachment: States May Impose Conditions on Wireless Carriers as Part of the ETC Designation Process

**States May Impose Conditions on Wireless Carriers
as part of the ETC Designation Process**

**Prepared at the Request of the Alaska Telephone Association by
Heather H. Grahame and Jeffrey S. Dillen, Dorsey & Whitney LLP**

**States May Impose Conditions on Wireless Carriers
as part of the ETC Designation Process**

**Prepared for the Alaska Telephone Association by
Heather H. Grahame and Jeffrey S. Dillen, Dorsey & Whitney LLP**

From time to time, commentators suggest that it is legally impermissible for states to impose any condition on a Commercial Mobile Radio Service (CMRS) provider seeking Eligible Telecommunications Carrier (ETC) designation. That position is legally incorrect

Federal law only limits state regulation of CMRS providers with respect to entry and rates. 47 U.S.C. § 332(c)(3) States are free to impose other conditions on CMRS providers in connection with applications for ETC designation. This is made clear by a 1999 decision of the Court of Appeals for the Fifth Circuit, where the court invalidated FCC rules barring state commissions from applying state conditions in ETC designations. The Court held that the FCC erred:

in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute [47 U.S.C. § 214] speaks to the question of *how many* carriers a state commission may designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements. This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support.¹

Accordingly, state commissions from across the nation have imposed conditions on CMRS providers that seek and obtain ETC designation

For example, in 1999, the Minnesota Public Utilities Commission conditioned final approval of Minnesota Cellular's ETC application on a compliance filing by the CMRS applicant demonstrating adequate service quality, using the state commission's existing service quality standards as a measure.² The Commission also required a tariff filing detailing the content, pricing, and terms and conditions of Minnesota Cellular's universal service offering. Accordingly, Minnesota Cellular submitted a tariff filing containing a description of its universal service offerings and prices, and a customer service agreement setting forth terms, conditions

¹ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999). The only limit articulated by the Fifth Circuit was the following: "if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of section 214(e)(2)'s mandate to 'designate' a carrier or 'designate more than one carrier.'" *Id.* at FN 31.

² *In Re Minnesota Cellular Corporation*, Docket No. P-5695/M-98-1285 (October 27, 1999)

and service quality standards.³ Similarly, in March 2003, the Minnesota Public Utility Commission conditioned final ETC designation of Midwest Wireless Communications, LLC's application for ETC designation on a compliance filing, including a tariff with terms and rates for a Basic Universal Service offering and a customer service agreement.⁴ Even more recently, the Minnesota Public Utility Commission denied an ETC application for a wireless carrier (Nextel) which lacked an adequate plan for expansion of its services throughout the applicable service area and a sufficient advertising plan.⁵ While the dismissal of the Nextel petition rendered any conditions on the wireless company's post-ETC designation operations premature, the Commission elaborated on the type of showing and conditions that are relevant to a public interest evaluation of a wireless company's ETC application, including.

1. a detailed description of a basic universal service plan or an explanation why it would be in the public interest to give an applicant access to universal service funding if the applicant does not offer an affordable, lower-cost service that specifically preserves and advances universal service,
2. a tariff showing the list, prices and terms of offered service, including the basic universal service plan, along with references to Lifeline and Link-Up;
3. a customer service agreement with a defined service quality plan, including dispute resolution policies, network maintenance policies, procedures for resolving service interruptions, customer remedies and billing, payment and deposit policies;
4. a method for tracking and disclosing customer complaints.⁶

In November 2003, the Vermont Public Service Board approved the application for ETC designation by RCC Atlantic, Inc. d/b/a UniceL, subject to numerous conditions including, *inter alia*, requiring RCC to offer a Basic Service Package and subjecting RCC to standards regarding

³ See *Minnesota Cellular Filing* dated December 27, 1999 in MPUC Docket No. P5695/M-98-1285

⁴ *In Re Midwest Wireless Communications*, Docket No. PT-6153/AM-02-686 (March 19, 2003) The Commission defined a Basic Universal Service plan to comprise all of the supported services under 47 C.F.R. § 54.101, including adequate local coverage, at an affordable rate. *Id.* at 4, 5, 9-10.

⁵ *In Re NPCR, Inc. d/b/a Nextel Partners*, Docket No. PT-6200/M-03-647 (December 1, 2003) (hereinafter "Nextel")

⁶ *Id.* at 8-9

retail service quality, disconnections, and customer deposits.⁷ In addition, the Vermont Public Service Board concluded that RCC's ETC designation would expire on December 31, 2005, and that RCC should provide detailed evidence concerning the scope of its effective coverage, including maps showing areas where there is an adequate signal, a weak signal and no usable signal, if RCC seeks recertification.

Other wireless providers have voluntarily filed such tariffs. For example, in Colorado, Western Wireless agreed to provide its universal service offerings in accordance with a written Customer Service Agreement which contained the terms and conditions of service.⁸ The Administrative Law Judge noted that the terms and conditions in the Stipulation under which Western Wireless Holding Co., Inc. would be providing its Basic Universal Service offering "are analogous to this Commission's quality of service rules for LECs in many respects."⁹ And, in Iowa, WW License LLC, d/b/a CellularOne agreed to file its customer service agreements with the Iowa Utilities Board, and made a commitment that the Board could investigate and review customer complaints at least with respect to its ETC offering and that the Iowa Utilities Board had the authority to review service quality issues.¹⁰

This list is illustrative of a growing trend among state commissions to impose meaningful conditions on their approval of the ETC applications of CMRS providers, whether such applications cover rural areas, such as in the Minnesota cases described above, or in non-rural service areas, such as in the Vermont *RCC* case. Even among those state commissions that have yet to impose conditions on CMRS ETC applicants, there is an acknowledgement that they have the authority to do so.¹¹

⁷ *In Re Designation of Eligible Telecommunications Carriers Under the Telecommunications Act of 1996 (In Re RCC Atlantic, Inc. d/b/a Unicef)*, Docket No. 5918, Ordered entered November 14, 2003 (hereinafter "RCC") at 51.

⁸ *In Re Application of Western Wireless Holding Co., Inc.'s Application for Designation as an Eligible Telecommunications Carrier*, Stipulation and Settlement Agreement, Docket No. 001-174T/Docket No. 00A-171T

⁹ *See Recommended Decision of Administrative Law Judge Ken F. Kirkpatrick Accepting Stipulation and Granting Applications*, Decision No. R-01-19 (Docket No. 00K-255T/00A-174T/00A-171T) (mailing date January 8, 2001) at 10. That decision was also approved January 8, 2001

¹⁰ *Re WWC License LLC, dba CellularOne*, Docket No. 199 IAC 39.2(4) dated November 21, 2000

¹¹ *See, e.g., In the Matter of the Requests of Alaska DigiTel, LLC for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996*, Regulatory Commission of Alaska, Order No. U-02-39(10), issued August 28, 2003, at 4 ("State commissions may impose conditions on the granting of ETC applications to assure that the public interest is met.")

The authority exercised by state commissions in these proceedings, as explained by the *Court of Appeals for the Fifth Circuit*, rests generally on the state's long-standing role and responsibility of ensuring that the public interest is protected. The inclusion of the phrase "consistent with the public interest, convenience, and necessity" in the controlling statute -- 47 U.S.C. § 214(e)(2) -- expresses Congress' intent that states should exercise some discretion to protect the public interest in ETC designations.¹² As state decision-makers have concluded:

It would have been largely pointless to assign these cases to state commissions and then deprive them of discretion to consider matters of state concern

* * *

[T]he phrase "public interest, convenience and necessity" ensures that decision-makers apply a broad standard of evidentiary relevance and also ensures that they have broad discretion in imposing conditions.¹³

In conclusion, it is legally permissible for states to impose conditions on wireless carriers seeking ETC designation. This has been explicitly found by the Fifth Circuit Court of Appeals, and has been put into practice by a growing number of state commissions

¹² *RCC, supra*, at Hearing Officer's Second Proposed Decision, at 14

¹³ *Id.* at 14-15 and 16-17.